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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 96

HAROLD T. WHITE, ALEXANDER M. WHITE, JR., AND WILLIAM I. FROTHINGHAM, AS EXECUTORS OF THE ESTATE OF ALEXANDER M. WHITE,

Petitioners,

vs.

THE UNITED STATES.

No. 97

HAROLD T. WHITE, SOLE SURVIVING EXECUTOR OF THE ESTATE OF WILLIAM A. WHITE,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

JOHN P. OHL,
CHARLES C. PARLIN,
Counsel for Petitioners.

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vs.

THE UNITED STATES.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

To the Honorable the Supreme Court of the United States:

The petition of Harold T. White, Alexander M. White, Jr., and William I. Frothingham, as Executors of the Estate of Alexander M. White, in cause No. 96 and the petition of Harold T. White, as Sole Surviving Executor of the

Estate of William A. White, in cause No. 97 respectfully shows to this Honorable Court:

I. These are petitions for writs of certiorari to the Court of Claims to review decisions made and entered in that court on December 6, 1937 (R. 47, 48). The opinion of the Court of Claims (R. 45) is reported in 21 Fed. Supp. 361. On February 4, 1938, petitioners filed motions for new trials in both causes which were overruled by an order entered March 7, 1938 (R. 48).

II. These causes originated by actions commenced in the Court of Claims against the United States to recover overpayments of Federal income tax for the year 1929 by the Estate of William A. White and for the period January 1 to September 21, 1929 (the final income tax return period), of Alexander M. White, deceased. Both cases are governed by the provisions of the Revenue Act of 1928 and Treasury Regulations 74 relating thereto. The issues raised are identical and the causes have been consolidated in the certified transcript of the record.

III. The question presented is whether admitted losses of $22,500 and $104,500 realized by the petitioners in 1929 on their Preferred Stock of Del-Bay Farms, Incorporated, a Delaware corporation, as the result of the complete liquidation of the said corporation in that year, are deductible to their full extent, or only to the extent of 12½% thereof.

IV. The facts, briefly summarized, are that in 1929 Alexander M. White owned 1,100 shares of the Preferred Stock of Del-Bay Farms, Incorporated, a Delaware corporation, which he had acquired at a cost of $110,000, and that the Estate of William A. White held 500 shares of said Preferred Stock which had been valued at $25,000 in the decedent's estate tax return in 1927 (R. 44, 46). In February, 1929, Del-Bay Farms, Incorporated, sold all of its assets,

except its bank balances, and on April 11, 1929, was dissolved, its activities ended and its office closed (R. 43). Following this, a liquidating dividend of $5 was paid on each share of its Preferred Stock whereupon such stock became worthless (R. 43). Alexander M. White received $5,500 as a result of such distribution, thereby realizing a loss of $104,500, and the Estate of William A. White received $2,500, realizing a loss of $22,500 (R. 43, 46). The stock certificates were never surrendered or transferred and the Executors of the estates of both decedents are still in possession of such certificates (R. 43).

The petitioners deducted the above losses in full in their returns for the year 1929 (R. 38-39, 45). The Commissioner of Internal Revenue notified the petitioners that there were deficiencies in their income taxes for the above periods and these deficiencies were paid and claims for refund filed (R. 38, 39, 40, 41). The Commissioner rejected the petitioners' claims for refund whereupon these actions were commenced (R. 39-40, 41). The court below upheld the Commissioner and held that because of the payment by the Corporation of a small liquidating dividend, the losses realized by the petitioners on the Preferred Stock of Del-Bay Farms, Incorporated, were capital net losses deductible only to the limited extent of 12½% rather than ordinary losses deductible in full from gross income. The court conceded that, in the ordinary sense of the terms, there had not been a sale or exchange of capital assets. It held, however, that a "sale or exchange" comprehended a liquidation because of the provisions of Section 115(c).

V. The reasons for granting the writs are:

A. The decision of the Court of Claims treating losses resulting from a distribution in complete liquidation as losses from "sales or exchanges" is in direct conflict with the decision of the Circuit Court of Appeals for the Ninth

Circuit in *Chester N. Weaver Company* v. *Commissioner*, decided June 2, 1938, as yet unreported, but set forth for convenience in Appendix B. This conflict as to the meaning of Section 115(c) should be resolved by this Honorable Court at this time.

B. The decision of the Court of Claims treating losses resulting from a distribution in complete liquidation as losses from "sales or exchanges" is directly contrary to the decision of this Court in *Burnet* v. *Harmel*, 287 U. S. 103, which held that only transactions which are *in fact* "sales or exchanges" in the usual and commonly understood meaning of such terms are within section 101.

C. The decision of the Court of Claims, in applying Section 115(c) (found in Supplement B relating to computation of net income), so as to enlarge the scope of section 101 (found in Supplement A relating only to Rates of Tax), raises a serious and important question of Federal law which should be definitely settled by this Honorable Court.

D. The number of corporate business failures entailing forced liquidations, together with the greatly increased number of voluntary dissolutions resulting from the current administrative policy of simplification of corporate structures makes the question of the correct treatment of liquidating distributions one of paramount importance. The result of the decision below, if left unchallenged, is to lead to the anomalous and ridiculous result that a small liquidating distribution in dissolution is more disadvantageous than no distribution at all.

WHEREFORE, for reasons stated more fully in the annexed brief, your petitioners pray that writs of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Claims of the United States, com-

manding said court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record of all proceedings in causes numbered and entitled docket No. 43001, Harold T. White, Alexander M. White, Jr. and William I. Frothingham, as Executors of the Estate of Alexander M. White *vs.* The United States, and No. 43002, Harold T. White, Sole Surviving Executor of the Estate of William A. White *vs.* The United States, to the end that the causes may be reviewed and determined in this Court, as provided in Title 28, Section 288 of the Code of Laws of the United States, and that the said final decrees of the said Court of Claims in the above entitled causes, and every part thereof, may be reviewed by this Court, and the determinations by the said Court of Claims, may be reversed and a mandate issued directing the relief prayed for in your petitioners' petitions in said Court of Claims; and your petitioners pray for such other and further relief as to this Court may seem just and proper; and your petitioners will ever pray.

Respectfully submitted,

JOHN P. OHL,
CHARLES C. PARLIN,
Counsel for Petitioners,
63 Wall Street,
New York, N. Y.

Dated, New York, N. Y., June 7, 1938.

SUPREME COURT OF THE UNITED STATES

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No. 97

HAROLD T. WHITE, SOLE SURVIVING EXECUTOR OF THE ESTATE OF WILLIAM A. WHITE,

Petitioner,

vs.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

Opinion Below.

The opinion of the Court of Claims, including the court's Special Findings of Fact and Conclusions of Law, was filed December 6, 1937 (R. 37-47) and is reported in 21 Fed. Supp. 361.

Jurisdiction.

The judgments of the Court of Claims were entered on December 6, 1937 (R. 47, 48). On March 7, 1938, motions for

new trials in both cases filed February 4, 1938, were by a further order overruled (R. 48). The time to apply for writs of certiorari therefore runs from March 7, 1938.

The petitions for writs of certiorari were filed June 7, 1938. The jurisdiction of this Court is invoked under 28 U. S. C., §288 (b) and is timely under 28 U. S. C., §350. *Morse v. United States*, 270 U. S. 151, 153. *United States v. Seminole Nation*, 299 U. S. 417, 421.

Question Involved.

The question presented is whether Section 101 of the Revenue Act of 1928 is made applicable by Section 115 (c) to the admitted losses of $22,500 and $104,500 realized on Preferred Stock at the time of the liquidation of Del-Bay Farms, Incorporated, a Delaware corporation.

Specifications of Error.

1. The court erroneously concluded in its opinion and judgment that Section 115 (c) which makes reference to 111 and 112 but not to 101 is nevertheless to be read as broadening the defined term used in Section 101 (b) which by specific direction is thereinafter defined in 101 (c):

2. The court erred in holding that Congressional approval was expressed by the enactment of Section 115 (c) after interpretation by the Commissioner, since no part of Regulations 74, Article 625, makes reference to capital losses and since Section 101(b) was amended so as to negative such construction.

3. The court erred in construing section 115(c) as the result reached is contrary to the history and the purpose of the section.

4. The court erred in not following as controlling in these causes the decision of this Court in *Burnet* v. *Harmel*, 287

U. S. 103, after having conceded that in the "ordinary sense of the term" there was not a "sale or exchange of capital assets."

5. The judgment rendered by the court is contrary to the provisions of Section 23(e), the court erring in making its opinion and judgment turn on a construction which ignored one of the three applicable sections.

Statute and Regulations Involved.

The relevant portions of the Revenue Act of 1928 and Regulations 74 are set forth in Appendix A.

ARGUMENT.

1. The decision below is directly in conflict with the decision of the Ninth Circuit Court of Appeals in Chester N. Weaver v. Commissioner.

The decision of the United States Circuit Court of Appeals for the Ninth Circuit in *Chester N. Weaver* v. *Commissioner*, announced June 2, 1938 (as yet unreported but set forth for convenience in Appendix B), is directly in conflict with the cases at bar. The facts are almost identical. In the *Weaver* case, as in the instant cases, a final liquidating distribution was received by preferred stockholders after the corporation had sold all of its assets for cash and dissolved. In both cases the stockholders in reporting their income on their Federal tax returns claimed a full deduction for the amount of their loss. In both instances the Commissioner disallowed the full deduction, claiming that the loss was realized in connection with the "sale or exchange" of the stock. The applicable provisions of the Revenue Act were substantially identical in all material respects.*

* In the *Weaver* case the Preferred Stock was held less than two years and therefore governed by the provisions of Section 23(r) relating to securities "sold or exchanged" which were not capital assets under Section 101; whereas in the instant cases the Preferred Stock having been held

In the instant proceedings the Commissioner was upheld by the Court of Claims while, on the other hand, he was overruled by the decision of the Circuit Court of Appeals for the Ninth Circuit in the *Weaver* case. The Court of Claims held that Section 115(c) made the phrase "sale or exchange" comprehend a distribution in liquidation. The contrary conclusion was reached by the Ninth Circuit in the *Weaver* case. The Ninth Circuit in *Chester N. Weaver Co.* v. *Commissioner*, held:

> "*Second.* By its terms § 23(r) (1) applies only to 'sales or exchanges'. We think the liquidating dividend here is neither, within the ordinary and accepted meaning of those terms. A 'sale or exchange' implies, we think, that each party to the transaction shall obtain something. We do not believe that the Townsend company received anything. There is no inconsistency with the application of § 115(c), because it does not say a liquidating distribution *is* an 'exchange', but says it 'shall be *treated*' as such for the purpose of applying §§111 and 112. It does not say that a liquidating distribution shall be treated as an 'exchange' for the purpose of §23(r) (1)." (Italics the Court's.)

This is directly contrary to the holding of the Court of Claims below after referring to sections 101 and 115(c) (R. 47):

> "We think the two sections should be *considered together*, and when so construed we find that the statute first defines a capital net loss as resulting from the *sale or exchange* of capital assets, and later provides that amounts distributed in complete or partial liquidation *shall be treated as made in exchange* for the stock. The provisions of section 115 make a liquidating dividend have the same effect as a *sale or exchange* of property." (Italics added.)

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more than two years the asserted limitation is to be found in Section 101(b) relating to the "sale or exchange" of capital assets held more than two years. Section 23(r) was new in the 1932 Act.

2. The Court below erroneously concluded in its opinion and judgment that Section 115(c) which makes reference to 111 and 112 but not to 101 is nevertheless to be read as broadening the defined term used in Section 101(b) which by specific direction is thereinafter defined in 101(c).

A. *Sections 101 and 115 Are Mutually Exclusive.*

Sections 101 and 115 should not be construed together. They are mutually exclusive. Section 101 deals only with "sales or exchanges as hereinafter defined in this section." The maxim *expressio unis est exclusio alterius* is clearly applicable.

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."

as was held in *Botany Mills* v. *United States*, 278 U. S. 282, 289; *Paso Robles Mercantile Co.* v. *Commissioner* (C. C. A. 9th), 33 F. (2d) 653, 654, cert. denied 280 U. S. 595; *Anderson* v. *P. W. Madsen Inv. Co.* (C. C. A. 10th), 72 F. (2d) 768, 770; *Martin* v. *Commissioner* (C. C. A. 2d), 61 F. (2d) 942, 944.

The court in *McFeely* v. *Commissioner*, 296 U. S. 102, has held that Sections 101(c) (8) and 113(a) (5) are mutually exclusive and that "each section should be read as affecting the subject to which alone it applies." Fully as good reason appears for likewise concluding that Sections 101 and 115 are mutually exclusive. Section 115(c) refers directly to section 111 which in turn makes reference to Section 113. Under the statutory scheme Section 115 like 113 has no relationship to Section 101 found in Supplement A entitled "Rates of Tax" and stated to be "Supplementary to Subtitle B, Part I" relating to "Rates of Tax".

B. *The Court Below Has Ignored the Second Sentence of Section 115(c).*

The second sentence of section 115(c) was omitted from the portion of Section 115(c) quoted in the opinion below. The disregarded second sentence directs:

> "The gain or loss to the distributee resulting from such exchange shall be *determined under section 111*, but shall be *recognized only* to the extent provided in section 112." (Italics added.)

The use of the phrase "*such* exchange" can only have been intended to invite attention to the same idea in the preceding sentence—". . . *treated as* in full payment in *exchange* for the stock." Again, as to section 115(c) the maxim *expressio unis est exclusio alterius* is applicable.

The omitted second sentence in 115 (c) in a clear unequivocal direction states that the "*determination*" is to be under Section 111 *not* 101. Moreover it is directed that the loss shall be "*recognized*" for tax purposes "*only*" to the extent provided in Section 112* *not* 101.**

It is respectfully suggested that the court below has by judicial legislation made the sentence read:

> "The gain or loss to the distributee resulting from such exchange shall be determined under sections 111 *and* 101, but shall be recognized only to the extent provided in sections 112 *or* 101, *whichever produces the greater tax.*"

The court cannot enact a law under the pretense of construing one. As was said in *Heiner* v. *Donnan*, 285 U. S. 312, 331:

> "For this court to do so would be to enact a law under the pretense of construing one and thus pronounce

* 100% recognized.
** 12½% recognized.

itself guilty of flagrant perversion of the judicial power."

C. *Cross Reference in Section 115 (c) to 111 and 112 Adequate.*

An application of Section 115(c) according to its literal meaning is possible, sensible and adequate. As to the treatment of amounts distributed in the complete liquidation of a corporation, Section 115(c) refers directly to Section 111. The terminology of Section 111 is:

> "*Except as hereinafter provided in this section,* the gain from the sale or *other disposition* of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the *loss shall be the excess of such basis over the amount realized.*" (Italics added.)

The reference to Section 111 in Section 115(c) allows the full quantum of the loss. The direct cross reference in 115(c) and the introductory phrase in 111 shows an intent to *exclude* Section 101 from consideration as to the percentage of deductibility recognizable. Literally both 115(c) and 101 are mutually exclusive. Both can be given their literal meaning and produce entirely sensible results. If the language be plain there is nothing to construe. *Hamilton* v. *Rathbone,* 175 U. S. 414, 419; *Thompson* v. *United States,* 246 U. S. 547, 551; see also Mr. Justice Roberts' dissenting opinion, Justices Brandeis and Stone concurring, in *Helvering* v. *N. Y. Trust Co.,* 292 U. S. 455, at 471:

> "Nothing could involve more dangerous consequences, than that the courts should rewrite plain provisions of a tax act in order to bring them into harmony with a supposed general policy."

D. *Decision Below Leads to Absurd Consequences.*

The construction by the court below does violence to the literal meaning of Sections 23(e), 101, 111 and 115(c) and

produces the entirely unreasonable result that the receipt of 1¢ per share, or a total of only $11, would make the tax $12,559.92 greater than if nothing had been received. On the literal construction of the Sections contended for by the petitioners herein and recently approved by the Ninth Circuit, the receipt of 1¢ per share would make an increase in tax of only $2.53 over the tax computed if nothing were received, an amount commensurate with the additional income. Such additional tax then becomes comparable to the amount payable if there had been no distribution at all, the stock having been entirely worthless. *Mont S. Echols* v. *Commissioner*, 61 F. (2d) 191 (C. C. A. 8th).

It is significant that this Court has previously in construing Section 101 placed emphasis on the dollar difference in tax under opposing constructions in *Helvering* v. *New York Trust Co.*, 292 U. S. 455, at 467, and footnote 4. Occasion was there taken to call attention to the fact that under the construction contended for by the Government the tax would be $252,667.66, whereas the tax under the taxpayer's contention would be $58,921.51. The conclusion was in favor of the taxpayer, the reason being given:

> "It is to be inferred that Congress did not intend penalization of that sort."

The same thought was again expressed in *McFeely* v. *Commissioner*, 296 U. S. 102, 111, and by the Circuit Court of Appeals for the Ninth Circuit in *Chester N. Weaver Co.* v. *Commissioner*, Appendix B.

Congress declared in Section 115(c) that reference should be made to 111. Congress said Section 111 excludes, in determining losses, Section 101. Congress has limited Section 101(b) to capital losses as therein expressly defined in 101(c). Notwithstanding, the court below has reached the surprising conclusion that Section 115(c) broadens the carefully limited scope of 101 without making reference thereto and thereby imposes a further qualification on the

determination of amount of loss under Section 111 in spite of the expressed language in 111 to the contrary.

3. The court below erred in holding that Congressional approval was expressed by the enactment of Section 115(c) after interpretation by the Commissioner, since no part of Regulations 74, Article 625, makes reference to capital losses and since Section 101(b) was amended so as to negative such construction.

A. *No References to Losses.*

The opinion below (R. 47) makes references to Article 625 of Regulations 74 as containing an administrative implication that Section 115 makes "a liquidating dividend have the same effect as a sale or exchange of property." The relevant part of Article 625 referred to states:

> "Any *gain* to the shareholder may, at *his option,* be taxed as a capital net *gain* in the manner and subject to the conditions prescribed in section 101 and articles 501-503." (Italics added.)

It will be noticed first that nowhere in the Article is there any reference whatsoever as to what happens in the event of a *loss.* An absence of administrative interpretation apropos of the question for decision furnishes a novel hypothesis upon which to base a conclusion of implied Congressional approval through subsequent enactments.

Why this omission in the Regulations to make the same references as to *losses?* It is natural in view of the fact that Sections 23(e) and 111 as well as Section 101(b) deals with losses.

B. *Congressional Disapproval of Regulations by Changes in 1928 Act.*

The opinion below concludes (R. 47):

> "Congress would seem to have approved the *Commissioner's interpretation* of the provisions of the 1924

and 1926 acts by *reenacting* them in the 1928 act." (Italics added.)

Even assuming *arguendo* that the Commissioner's Regulations had any interpretation apropos of the treatment of losses, Congress in the 1928 Act rather then *reenacting* the Section in *haec verba* removed all doubt upon the question by *amending* the provisions of the earlier 1926 and 1924 Acts. Article 1545 of Regulations 65 and 69 contained a cross reference (limited to *gains*) to Section 208 of the 1924 and 1926 Acts. But this cross reference was disapproved in the 1928 Act—not by adding language to Section 115 (as it was not needed there since as contended herein and as recently held by the Ninth Circuit that section serves an entirely different purpose and is self sufficient) but by an addition to section 101 itself.

Revenue Act of 1928.	*Revenue Act of 1926.*
In the case of any taxpayer, other than a corporation, who for any taxable year sustains a capital net loss (*as hereinafter defined in this section*), there shall be levied, collected, and paid * * * "	In the case of any taxpayer (other than a corporation) who for any taxable year sustains a capital net loss, there shall be levied, collected, and paid * * * "

The phrase "(*as hereinafter defined in this section*)" was added for a purpose. It was added in both 101(a) and 101(b). It excludes definitions of "capital net loss", the phrase modified, other places in the Act. The clear intent of Congress should not be set aside by resort to a cross reference in Regulations under prior acts which have been disapproved and which do not even contain language literally covering the instant situation.

The rule announced by this Court in *McFeely* v. *Commissioner*, 296 U. S. 102, 111 applies:

"Under these circumstances we ought not to depart from the plain meaning of the section in an effort to bring about a uniformity which it is claimed Congress intended but failed to express."

4. The court below erred in construing Section 115(c) as the result reached is contrary to the history and the purpose of the section.

On June 3, 1918, this Court decided *Lynch* v. *Turrish*, 247 U. S. 221, involving a consideration of the treatment to be accorded a final liquidating distribution under the Revenue Act of 1913. The Government there sought to tax the difference between the cost of the stock and the amount distributed to the stockholders which this Court there held could not be done. This decision the Treasury Department regarded as revealing a serious loop-hole in the law. As the Revenue Act of 1918 was then in the course of preparation what became Section 201(c) of the Act was written into the bill. This provided that:

"Amounts distributed in the liquidation of a corporation *shall be treated as* payments in exchange for stock or shares, and *any gain or profit* realized thereby shall be taxed to the distributee *as other gains or profits.*" (Italics added.)

The Treasury Department and Congress were thinking only of insuring the collection of a tax upon any gain realized upon liquidations similar to those held not taxable in *Lynch* v. *Turrish*, 247 U. S. 221. As "income" meant " 'the *gain* derived from *capital*, labor or from both combined', provided it be understood to include *profit gained through a sale or conversion of capital assets*" (*Eisner* v. *Macomber*, 252 U. S. 189, 207), the analogy chosen was to tax the liquidating profit gained through conversion in the same manner as "other gains or profits" were already taxed under the Act.

Significant is the fact that at the time of the Revenue Act of 1918 there was no provision in the law comparable to Section 101 of the 1928 Act relating to capital gains and losses. Consequently, historically the special treatment accorded distributions in complete liquidation as in exchange for stock has no relation whatsoever to the later special treatment of capital gains and losses in Section 101. Therefore it would be unreasonable to construe the subsequently introduced Section 101 dealing with only sales or exchanges of capital assets as requiring a changed meaning for the already well understood provisions of Section 115(c), relating to another type of capital transaction. As was distinctly stated in *McFeely* v. *Commissioner*, 296 U. S. 102, 110, in construing section 101(c)(8) with Section 113 (a)(5):

> "The fact that the two sections deal with the same general subject—capital gains—is cited in support of the Commissioner's position that they ought to be consistently applied. There is, however, nothing novel in the naming of arbitrary 'basis' dates differing from the admitted dates of acquisition."

The reason for the enactment of section 201(c)* was simply to make it clear that Congress disapproved of the Treasury Department's treatment of distributions in liquidation as current yield or like ordinary dividends. Congress made it clear that it regarded the profit or loss realized upon the liquidation of a corporation *as capital in character* rather than current or periodic income. This is perfectly clear if subsection (a) of Section 115 be compared with (c).

A liquidating distribution contemplates the return of investment, the wiping out of the shareholder's interest in the corporation and may or may not involve the return of

* Comparable to Sec. 115(c) of Rev. Act of 1928.

profits. A distribution in liquidation is not current gain but *capital* gain and it was therefore decided that such gain should be taxed as such *other gains or profits* and not as the receipt of an ordinary dividend. The court has stated in *Hellmich* v. *Hellman*, 276 U. S. 233, at 237:

> "The gains realized by the stockholders from the distribution of the assets in liquidation were subject to the normal tax *in like manner as if* they had sold their stock to third persons." (Italics added.)

5. The court below erred in not following as controlling in these causes the decision of this Court in Burnet v. Harmel, 287 U. S. 103, after having conceded that in the "ordinary sense of the term" there was not a "sale or exchange of capital assets."

A. *Ordinary Meaning Required.*

The opinion of the court below concedes that there was not in the ordinary sense of the terms a "sale or exchange". No other position is tenable. *Burnet* v. *Harmel*, 287 U. S. 103. The *Harmel* case presented the question whether profit derived from the granting of leases to oil or mineral properties construed under the state law to be a "sale in place" were profits from "sales or exchanges". Although property rights were sold for cash, this Court refused to expand the meaning of "sale or exchange" to comprehend a lease for the reason that, generally speaking (the State laws of a few States to the contrary notwithstanding), such leases "would not generally be described as a sale" of the mineral contents of the soil, using the term either in its technical or in its commonly understood sense. To hold the contrary, this Court declared, would have been to adopt a distorted rather than the common meaning of the term "sale". In the words of Mr. Justice Stone writing for the Court in the *Harmel* case, 287 U. S. 103, 108:

> "Congress legislated in the light of this history, cf. United States *v.* Merriam, 263 U. S. 179, 187; and, in the absence of explicit language indicating a different purpose, it cannot be taken to have intended that an oil and gas lease under the capital gains provisions, any more than a mineral lease under the earlier acts, should be treated like an ordinary sale of land or chattels, resulting in a conversion of capital assets. Such a construction would have disregarded legislative and judicial history of persuasive force; it would have adopted a distorted, rather than the common meaning of the term sale, see Old Colony R. Co. v. Commissioner, 284 U. S. 552, 561, and would have tended to defeat rather than further the purpose of the Act."

The mandate of *Burnet* v. *Harmel*, 287 U. S. 103, that the special treatment accorded by Section 101 is limited strictly to the common meaning of the terms employed, can lead but to one conclusion: *Hellmich* v. *Hellman*, 276 U. S. 233, holds that distribution in liquidation is not a sale but *only analogous* to a sale; *Burnet* v. *Harmel*, 287 U. S. 103, holds that merely an *analogy to a sale is not sufficient* to bring such analogy within the purview of the section.

B. *Doubt to Be Resolved in Favor of Petitioners.*

As was stated in *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, at 561:

> "If there were doubt as to the connotation of the term, or another meaning might be adopted, the fact of its use in a tax statute would incline the scale to the construction most favorable to the taxpayer. *Gould* v. *Gould*, 245 U. S. 151; *United States* v. *Merriam*, 263 U. S. 179; *Bowers* v. *Lighterage Co.*, 273 U. S. 346; *United States* v. *Updike*, 281 U. S. 489; *Burnet* v. *Niagara Falls Brewing Co.*, 282 U. S. 648."

See also *McFeely* v. *Commissioner*, 296 U. S. 102, 111.

6. The judgment rendered below is contrary to the provisions of Section 23(e), the court below erring in making its opinion and judgment turn on a construction which ignored one of the three applicable sections.

A. *Opinion Ignores Section 23(e).*

Nowhere in the court's opinion below is there any reference whatsoever to Section 23(e) of the Revenue Act of 1928. This Section granting the petitioners a 100% deduction in unequivocal terms has been ignored, the court poising the construction problem as follows:

> "The case turns on the construction of sections 101 and 115 of the revenue act of 1928 as applied to capital gains and losses."

This is the more surprising since under the special findings of fact No. 1 submitted by petitioners, it is found:

> "* * * The issues to be determined by the Court are identical in the two cases, the chief of which is whether the loss for 1929 should be treated as an ordinary loss under section 23(e) of the Revenue Act of 1928 as claimed by plaintiff or as a capital loss under section 101 of the same Act as claimed by defendant."

B. *Every Relevant Section Should Be Considered.*

Petitioners are not advised by the opinion as to why Section 23(e) should not be considered; why the construction adopted should not at least attempt to harmonize all three provisions, Sections 23(e), 101(b), and 115(c). See *Hellmich* v. *Hellman*, 276 U. S. 233, 237; *Kohlsaat* v. *Murphy*, 96 U. S. 153, at 159-160.

C. *Relationship Between Sections 23 and 101 Established.*

The statutory relationship between one of the subdivisions of Section 23 and Section 101 has been the subject

of special consideration by this Court in *Helvering* v. *Bliss*, 293 U. S. 144, wherein it was unanimously held (p. 150):

> "By the express words of § 23(n) charitable contributions are to be deducted to ascertain net income as defined in § 21; and nothing in § 101, which prescribes merely a method for segregating a portion of that net income for taxation at a special rate, in any wise alters the right of the taxpayer to take the deduction in accordance with § 23(n)."

This Court also took special pains to point out (p. 151):

> "Nor should the reduction in the rate of tax on capital gain, first granted in the Revenue Act of 1921, be held to circumscribe the privilege granted in the earlier Acts, and retained in later ones, with respect to charitable contributions, unless that result be plainly required by the language used."

No reason can be found why subdivision (e) of Section 23 should not be accorded the same treatment as subdivision (n).

Conclusion.

The petition for writs of certiorari should be granted.

Respectfully submitted,

JOHN P. OHL,
CHARLES C. PARLIN,
Counsel for Petitioners,
63 Wall Street,
New York, N. Y.

June 7, 1938.

APPENDIX A.

Statutes and Regulations Involved.

REVENUE ACT OF 1928.

(Italics in text supplied.)

Subtitle B—General Provisions.

Part I—Rates of Tax.

* * * * * * *

Part II—Computation of Net Income.

"SEC. 21. *Net Income.*

'Net income' means the gross income computed under section 22, less the deductions allowed by section 23."

"SEC. 22. *Gross Income.*

(a) *General Definition.*—'Gross income' includes *gains, profits,* and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or *sales,* or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or *gains* or *profits* and income derived from any source whatever.

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * * * *

(d) *Distributions by Corporations.*—Distributions by corporations shall be taxable to the shareholders as provided in section 115.

(e) *Determination of Gain or Loss.*—In the case of a *sale or other disposition* of property, the gain or loss shall be computed as provided in sections 111, 112, and 113."

"SEC. 23. *Deductions from Gross Income.*

In computing net income there shall be allowed as deductions: * * *

(e) *Losses by individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—* * *

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or * * *

(g) *Basis for Determining Loss.*—The basis for determining the amount of deduction for losses sustained, to be allowed under subsection (e) * * *, shall be the same as is provided in section 113 for determining the gain or loss from the *sale or other disposition* of property."

Subtitle C—Supplemental Provisions.

Supplement A—Rates of Tax.

[Supplementary to Subtitle B, Part I.]

"SEC. 101. *Capital Net Gains and Losses.*

(a) *Tax in case of capital net gain.* * * *

(b) *Tax in case of capital net loss.*—In the case of any taxpayer, other than a corporation, who for any taxable year sustains a *capital net loss* (*as hereinafter defined in this section*), there shall be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted, and the total tax shall be this amount minus 12½ per centum of the capital net loss; but in no case shall the tax of a taxpayer who has sustained a capital net loss be less than the tax computed without regard to the provisions of this section.

(c) *Definitions.*—For the purposes of this title—* * *

(2) 'Capital loss' means deductible loss resulting from the *sale or exchange* of capital assets.

(3) 'Capital deductions' means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets *sold or exchanged* during the taxable year.

* * * * * * *

(6) *'Capital net loss'* means the excess of the sum of the *capital losses* plus the capital deductions over the total amount of capital gain.

(7) 'Ordinary net income' means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital deductions.

(8) 'Capital assets' means property held by the taxpayer *for more than two years* (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business."

Supplement B—Computation of Net Income.

[Supplementary to Subtitle B, Part II.]

"SEC. 111. *Determination of Amount of Gain or Loss.*

(a) *Computation of gain or loss.—Except as hereinafter provided in this section,* the gain from the *sale or other disposition* of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

(b) *Adjustment of basis.*—In computing the amount of gain or loss under subsection (a)—

(1) Proper adjustment shall be made *for any* expenditure, *receipt,* loss, or other item, *properly chargeable to capital account,* and * * *

(c) *Amount realized.*—The amount realized from the *sale or other disposition* of property shall be the sum of any

money received plus the fair market value of the *property (other than money)* received.

(d) *Recognition of gain or loss.*—In the case of a *sale or exchange*, the extent to which the gain or loss determined under this section shall be *recognized* for the purposes of this title, shall be determined under the provisions of section 112."

"SEC. 112. *Recognition of Gain or Loss.*

(a) *General rule.*—Upon the *sale or exchange* of property the entire amount of the gain or loss, determined under section 111, shall be *recognized, except as hereinafter provided in this section.* [None of the exceptions applicable] * * *"

"SEC. 113. *Basis for Determining Gain or Loss.*

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the *sale or other disposition* of property acquired after February 28, 1913, shall be the cost of such property except * * *" [None of the exceptions applicable]

"SEC. 115. *Distributions by Corporations.*

(a) *Definition of dividend.*—The term 'dividend' when used in this title * * * means any distribution made by a corporation to its shareholders, whether *in money or in other property*, out of its earnings or profits accumulated after February 28, 1913.

* * * * * * *

(c) *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation *shall be treated as in full payment in exchange for the stock,* * * *. The gain or loss to the distributee resulting from *such exchange* shall be *determined under section 111, but shall be recognized only to the extent provided in section 112.* * * *"

REGULATIONS 74.

"ART. 625. *Distributions in liquidation.*—Amounts distributed in complete liquidation of a corporation are to be

treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation are to be treated as in part or full payment in exchange for the stock so canceled or redeemed. The phrase 'amounts distributed in partial liquidation' means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock. A complete cancellation or redemption of a part of the corporate stock may be accomplished, for example, by the complete retirement of all the shares of a particular preference or series, or by taking up all the old shares of a particular preference or series and issuing new shares to replace a portion thereof, or by the complete retirement of any part of the stock, whether or not pro rata among the shareholders.

The gain or loss to a shareholder from a distribution in liquidation is to be determined, as provided in section 111 and article 561, by comparing the amount of the distribution with the cost or other basis of the stock provided in section 113 and articles 591-604; but the gain or loss will be recognized only to the extent provided in section 112 and articles 571-580. Any gain to the shareholder may, at his option, be taxed as a capital net gain in the manner and subject to the conditions prescribed in section 101 and articles 501-503. In the case of amounts distributed in partial liquidation, other than a distribution in pursuance of a plan of reorganization as described in section 112(h), the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits within the meaning of section 115(b) for the purpose of determining the taxability of subsequent distributions by the corporation.

Example (1): A owns 10 shares of stock in the M Corporation for which he paid $1,250 in 1923. He receives in 1928 a dividend of $1,500 in complete liquidation. A is subject both to the normal tax and to the surtax upon his profit of $250 or at his option, in lieu of such taxes, to the tax upon capital net gain.

Example (2): A owns 10 shares of preferred stock and 10 shares of common stock in the M Corporation which he pur-

chased in 1918 for $1,100 and $1,000, respectively. In 1928 the M Corporation has on hand $225,000 of capital, earnings and profits of $25,000 accumulated prior to March 1, 1913, and earnings and profits of $125,000 accumulated after February 28, 1913. The preferred stock is retired at $125 per share, $125,000 being used by the corporation for this purpose. A receives $1,250 in exchange for his 10 shares of preferred stock and is therefore subject to the normal tax and the surtax on $150, or at his option, in lieu of such taxes, to the tax upon capital net gain. The M Corporation then distributes a cash dividend of $25,000 on the common stock, which is subject only to the surtax. Without any further accumulation of earnings and profits, the M Corporation thereafter liquidates completely. A receives $2,250 in exchange for his 10 shares of common stock and is therefore subject to the normal tax and the surtax on $1,250, or at his option, in lieu of such taxes, to the tax upon capital net gain."

APPENDIX B.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 8572.

CHESTER N. WEAVER COMPANY, a Corporation, *Petitioner*,

vs.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

Jun. 2, 1938.

Upon Petition to Review a Decision of the United States Board of Tax Appeals.

Before Garrecht, Haney and Stephens, Circuit Judges.

Haney, Circuit Judge.

Review is sought of a decision of the Board of Tax Appeals which sustained a determination of respondent that there was a deficiency in the income tax paid by petitioner for the year 1933.

Petitioner, a California corporation, on August 9, 1932, purchased from Jeff R. Townsend Company, Inc., a California corporation, hereinafter referred to as the Townsend company, 1,000 shares of the latter's preferred stock, paying therefor $100 per share. The Townsend company's articles of incorporation provided that in the event of liquidation, its preferred stockholders would be entitled to receive a sum equal to 105 per cent of the par value of the preferred stock before any amount would be distributed to the holders of its common stock.

In 1933, the Townsend company became financially involved and unable to continue its business. On September 17, 1933, in order to dissolve and liquidate, it sold all its assets for $26,280.50, which on the next day was distributed pro rata to its preferred stockholders, who at the same time surrendered their certificates for preferred stock. Petitioner received a liquidating dividend in the sum of $13,140.25.

In its income tax return for the year 1933, petitioner claimed a deduction of $86,859.75 as a loss on such preferred stock, being the difference between the amount paid by petitioner for the stock, and the amount of the liquidating distribution. Respondent disallowed the deduction because "the loss sustained in connection with the stock is held to be from an exchange of stock held less than two years" and petitioner "had no gain from sales or exchanges of assets held less than two years". Respondent relied on § 23(r) of the Revenue Act of 1932 (47 Stat. 169).

On petition to redetermine the deficiency the Board sustained respondent, holding that "this disposition of the stock, under the provisions of the statute considered above, was a sale or exchange and the deduction of the losses sustained is barred by the provisions of section 23(r)(1)". Five members of the Board dissented. The instant petition to review the decision of the Board, entered pursuant to its holding, was then filed.

Section 21 of the act provides:

"'Net income' means the gross income computed under section 22, less the deductions allowed by section 23."

Section 22 provides in part:

"(a) 'Gross income' includes * * * income derived from * * * sales, or dealings in property * * *

"(d) Distributions by corporations shall be taxable to the shareholders as provided in section 115."

Section 23 provides in part:

"In computing net income there shall be allowed as deductions: * * *

"(f) Subject to the limitations provided in subsection (r) of this section, in the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise * * *

"(r) (1) Losses from sales or exchanges of stocks and bonds * * * which are not capital assets (as defined in section 101) shall be allowed only to the extent of the gains from such sales or exchanges * * *"

Section 115 provides in part:

"(c) Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112 * * *"

We think that petitioner is entitled to the deduction by virtue of §§ 22(d), 115 (c) and 112. The amount received by petitioner was a liquidating dividend. Under § 22(d), that dividend is taxable as provided in § 115(c) Under the latter section, the gain or loss is to be computed under § 111 but the amount arrived at by the computation shall be recognized to the extent provided in § 112. Under § 112, the entire amount of the loss must be recognized.

Petitioner contends that the deduction is authorized by § 23(f), and argues that the limitation in § 23(r)(1) is not

applicable. Section 23(f) is a general statute relating to losses, whereas §§ 22(d), 115(c) and 112 are special with respect to the particular situation. Where there are two statutes, one being a general statute, and the other being a specific statute, and both cover the same subject matter, the specific statute should control. Therefore, we think § 23(f) should not be applied.

Respondent contends that § 23(r)(1) prohibits the deduction. It is asserted, as the Board held, that in effect there was an exchange of the stock for money. Petitioner argues, as the dissenting opinion of the Board members points out, that the legislative history of § 23(r)(1) was not intended to apply to such a situation as is present here. We think § 23(r)(1) is not applicable.

First. Section 23(r)(1) is broader and includes more transactions than §§ 22(d), and 115(c) and 112. As compared with those sections, it again is general. The specific statute should control rather than the general statute.

Second. By its terms § 23(r)(1) applies only to "sales or exchanges". We think the liquidating dividend here is neither, within the ordinary and accepted meaning of those terms. A "sale or exchange" implies, we think, that each party to the transaction shall obtain something. We do not believe that the Townsend company received anything. There is no inconsistency with the application of § 115(c), because it does not say a liquidating distribution *is* an "exchange", but says it "shall be *treated*" as such for the purpose of applying §§ 111 and 112. It does not say that a liquidating distribution shall be treated as an "exchange" for the purpose of § 23(r)(1).

Third. Had there been no liquidating dividend on the stock, petitioner could have deducted the entire loss. Reg. 77, Art. 174. (Same rule applies to bonds. Art. 194.) The rule announced by the Board leads to the conclusion that a holder of $100,000 of stock who gets a liquidating dividend of ten cents, cannot deduct his $99,999.90 loss. Such construction should be avoided, we think, on the authority of United States *v.* Katz, 271 U. S. 354, 357, where it is said:

"All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given it, consistent with the legislative purpose * * *"

Fourth. The most that can be said for respondent, is that it is doubtful whether §§ 22(d), 115(c) and 112, on the one hand, or § 23(r)(1) on the other hand is applicable. The rule announced in Gould *v.* Gould, 245 U. S. 152, 153, is applicable, we think, and is: "In case of doubt they [taxing statutes] are construed most strongly against the Government, and in favor of the citizen." Therefore, § 23(r)(1) should be construed as not applicable to petitioner.

We believe it is unimportant, whether the "deduction may be taken in the form of a minor or negative item of gross income", as mentioned by the Board, or whether it is taken as an outright deduction.

Decision reversed.

STEPHENS, *Circuit Judge, Dissenting:*

The Chester N. Weaver Company, the petitioner here, is a California corporation. Consolidated on review and dependent on the decision of this court upon this petition are petitions for review brought by Chester N. Weaver and Elsie S. Weaver.

On December 2, 1931, Mr. and Mrs. Weaver purchased 500 shares each of the six per cent cumulative preferred stock of the Jeff R. Townsend Company, hereinafter referred to as the Townsend Company, paying therefor $500 per share. On August 9, 1932, the Weaver Company acquired from the same corporation 1,000 shares of its preferred stock at the same price per share. The 2,000 shares of preferred stock so purchased constituted all of the preferred stock of the Townsend Company. The common stock belonged to other interests. The articles of incorporation provided that in the event of liquidation the holders of preferred stock should be entitled to receive therefor a sum equal to 105 per cent of the par value thereof before any amount should be distributed to the holders of the common stock.

Early in 1933 the Townsend Company became financially involved and unable to continue business. Its stockholders took the necessary steps to effect its dissolution and liquidation. On or about September 17, 1933, it sold all of its assets to the Weaver Company for $26,780.50. On September 18, 1933, the two Weavers and the Weaver Company, holders of all of the preferred stock of the Townsend Company, surrendered their stock certificates for cancellation and for the purpose of completing liquidation and effecting dissolution of that company. The $26,280.50 received for its assets was distributed in liquidation to the preferred stockholders pro rata. The Weaver Company received $13,140.25; Chester N. Weaver, $6,560.13, and Elsie S. Weaver, $6,570.12.

In their income tax returns for 1933 each of the stockholders deducted as a loss the difference between the amount paid for the preferred stock so surrendered and the amount received in liquidation, and, in determining the deficiencies herein, the Commissioner disallowed the deductions so claimed.

The Board of Tax Appeals held that the deductions were barred by Section 23(r) (1) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and approved the Commissioner's determination. Accordingly it decided that the deficiency due from the Weaver Company amounted to $4,323.48; that from Chester N. Weaver, $8,832.43; and that from Elsie N. Weaver, $2,447.84.

Section 23(r) (1) provides as follows:

"Losses from sales or exchanges of stocks and bonds [as defined in subsection (t) of this section] which are not capital assets [as defined in section 101] shall be allowed only to the extent of the gains from such sales or exchanges [including gains which may be derived by a taxpayer from the retirement of his own obligations]."

Since it is not claimed by the petitioner that the surrendered stock was a capital asset or that it has non-capital gains which might offset the loss here claimed, the only question presented is whether the petitioner's act of surrendering its stock in the Townsend Company and that company's act of

paving the petitioner $13,140.25 for the stock which was in complete liquidation of the company, constituted a sale or exchange of stock within the meaning of Section 23(r) (1). If it did the decision of the Board disallowing the claimed deduction was proper.

In order to decide the question before us it seems advisable to relate section 23(r) to other applicable sections in the framework of the Revenue Act. Sections 11, 12 and 13 of the Revenue Act of 1932 provide for a yearly tax upon the net income of every individual and every corporation. Section 21 provides that:

"'Net income' means the gross income computed under section 22, less the deductions allowed by section 23."

It is evident then, that in claiming the right to take a deduction it is necessary to show that it is authorized by section 23. New Colonial Co. *v.* Helvering, 292 U. S. 435, 440.

Among other allowable deductions enumerated in section 23 is that set out in subsection (f):

"Losses by Corporations.—Subject to the limitations provided in sub-section (r) of this section, in the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise."

It is under authority of this last-quoted subsection that petitioner claims the right to deduct the difference between the amount paid for the Townsend Company stock and the amount distributed to it as a stockholder on liquidation of that corporation.[1]

It is to be noted that section 23(f) is self-limited by section 23(r) [which has been quoted above]. The general effect of the two subsections when taken together is that a corporation may deduct all losses it sustains, provided, however, that if a loss results from a sale or exchange of stocks or bonds it may be deducted only to the extent that the corporation has gained from such sales or exchanges.

Petitioner's position is that it suffered a loss on the liquidation of the Townsend Company and that this loss did not

[1] Section 23(e) which applies to individuals, has the same effect, insofar as we are here concerned, as has 23(f) in the case of corporations.

result from a sale or exchange of stocks or bonds, and that consequently the whole amount thereof is deductible. One branch of petitioner's argument is founded on quotations from Congressional committee reports. It is asserted that these reports show that Congress did not intend to make liquidation distributions subject to the limitations of section 23(r). We do not think it is proper to resort to such sources since, as will be seen, the Act itself provides the solution to the problem without extraneous aid. Moreover, the reports relied on afford, at best, merely negative evidence of the Congressional intent. The fact that the reporting committees have nowhere specifically stated that distributions on liquidation were to be treated as exchanges within the meaning of section 23(r) is not persuasive that they intended to exclude such transactions from the operation of that section.

A second argument advanced by the taxpayer is that section 22 makes it clear that there is a distinction between a sale or exchange on one hand and a distribution in liquidation on the other. It is pointed out that subsection (d) of section 22 provides that:

"Distributions by corporations shall be taxable to the shareholders as provided in section 115."

while in the next subsection (e) it is provided that:

"In the case of a sale or other disposition of property, the gain or loss shall be computed as provided in sections 111, 112, and 113."

It is urged that the differentiation thus made in Section 22 between a corporate distribution and a "sale or other disposition of property" shows that a distribution on liquidation is not a "sale or exchange" within the meaning of section 23(r). We do not find this argument persuasive—in fact the provisions thus called to our attention are in the last result influential toward a conclusion opposite to that suggested by petitioner. That such is their effect, we think, becomes clear when section 115, [to which section 22(d) refers] is examined.

Section 115 [which is entitled "Distributions by Corporations" as is section 22(d)] defines the term "dividend"

in subsection (a); and in subsection (b) fixes the source of corporate distributions for the purposes of the Act. Subsection (c) provides in pertinent part:

"Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112."

We believe that the phrasing of this section shows an intent to settle for tax purposes the somewhat anomalous character of a liquidation distribution transaction as a sale or exchange of the stock for the amount distributed. We think this interpretation is borne out when, as directed by section 115(c), reference is made to section 112, for that section is concerned only with the recognition of gain or loss upon "the sale or exchange of property"—if a distribution in liquidation is not fixed as a "sale or exchange" by section 115(c) the reference therein to section 112 would be without effect.

It is further significant to note that section 23(r) first appeared in the Revenue Act of 1932. The Revenue Act of 1928[2] contained subsections (d) and (e) of section 22 and subsection (c) of section 115 in form identical with that in which they appear in the 1932 act. Thus it appears that when subsection (r) of section 23 was enacted, distributions in liquidation had previously been impressed with the character of payments on sale or exchange. The reenactment without change of the sections characterizing liquidation distributions as exchanges, in the Act which first limited the deductibility of losses on stock sales or exchanges, is strongly indicative of the intention of Congress to include within the limitation provisions of section 23(r) such liquidation transactions.

[2] May 29, 1928, c. 852, §§ 22, 115, 45 Stat. 797, 822. Substantially identical provisions were also included in the Revenue Acts of 1918, 1924 and 1926.

In addition to petitioner's contentions so far discussed another argument, or an elaboration of that just disposed of, has been advanced. Ingenious though it may be we do not consider it sound. The elaboration is based upon the reference in section 22(d) to section 115, which section in turn refers to sections 111 and 112. The substance of this supplemental argument is: under the reference in 115(c) only subsection (c) of section 111 is applicable since that subsection alone deals with "exchanges", with which character 115(c) endows distributions in liquidation; that section 111(c) refers to section 112 for the recognition of loss in the case of an "exchange"; and that section 112(a) [the only portion of section 112 which is applicable] provides that upon an "exchange" the entire amount of the gain or loss is to be recognized. It is not clear whether petitioner advances the foregoing argument only to bolster the contention that the Revenue Act clearly recognizes a distinction between a "distribution in liquidation" and an "exchange" or whether petitioner is claiming that losses resulting to stockholders from corporate liquidations are to be given effect through section 22(d) without regard to the provisions of section 23. The latter interpretation was given the argument by the Board.

Since, as we see it, the statutory analysis upon which the argument proceeds is faulty it can be given no weight wherever it is intended to lead.

Section 111(c), claimed to be the sole provision of section 111 applicable under reference from section 115(c), does not fix the mode of *determination* of gain or loss [for which purpose 115(c) refers to 111] but merely refers to section 112 for the provisions governing *recognition* of the loss *determined* under other of its own provisions. Unless then we assume that the law-making body performed a useless act when it enacted in section 115(c) a reference to section 111, we are bound to give application to other portions of section 111 than subsection (c) thereof for 115(c) *itself* refers to section 112 for *recognition* of loss. Again, if petitioner's argument were to be accepted the result would be that though 115(c) distinguishes between "determination" and "recognition" of gain or loss by reference to sections 111 and 112 respectively, the net effect of the references

would be the "recognition" of a gain or loss nowhere "determined". Moreover, when section 111 is read as a whole, the expression "sale or other disposition of property" used in subsections (a) and (b) thereof is seen to have been intended to cover an "exchange" for subsection (c) thereof refers to section 112 only in those instances in which there has been a determination "under this section [section 111]" of the extent of gain or loss on "a sale or exchange." There could be no determination of loss on an "exchange" under section 111 unless the phrase "other disposition of property" contained in that section is inclusive of "exchange."

Moreover, if losses on liquidation distributions are to be governed by the provisions of section 22(d), 115(c), 111 and 112 without regard to section 23, logic would lead to the conclusion that section 23(r) is in *no* case to be given any effect. This is true because both in the case of a "distribution by a corporation" [22(d)] and in the case of a "sale or other disposition of property" [22(e)] the ultimate reference is to section 111 for "Determination," and to section 112 for "Recognition" of gain or loss. If the provision of section 112 to the effect that the entire amount of gain or loss (determined under section 111) shall be "recognized" means in the case of liquidation that such loss may be deducted independent of the provisions of section 23, the same result must follow in the case of a sale of stock. And if it does follow, then section 23(r) can be given no effect or operation. By the same token the references made in subsections (e) and (f) of section 23 to "the limitations provided in subsection (r)" would be purposeless, for the transactions limited by "subsection (r)" do not, under this view, come within the purview of 23(e) or (f).

I conclude that the separate provision in section 22 as to distributions by corporations on one hand and sales or other dispositions of property on the other hand does not make a distinction between a distribution in liquidation and a sale or exchange such as to prevent the application of section 23(r). On the contrary the ultimate effect of these provisions is to make it clear that such transactions are "exchanges" within the meaning of section 23(r) and therefore

subject to the limitations therein provided. The rule is long-established that the intention of the lawmaker is to be deduced from a view of every material part of a statute. Hellmich *v.* Hellman, 276 U. S. 233, 237. Congress having classified a transaction involving a distribution in liquidation as an exchange such classification requires it to be treated as coming within any provisions pertaining to exchanges.

It has previously been held that the provision of section 115(c) that amounts distributed in liquidation "shall be treated as in full payment in exchange for the stock" characterizes such transactions as "exchanges" for income tax purposes. In White *v.* U. S. (Ct. of Clms. 1937) 21 Fed. Supp. 361, it was held that an amount received by a holder of preferred shares on partial liquidation of a corporation was properly treated as a "capital" rather than an "ordinary" loss, the court stating that the provisions of section 115(c) "make a liquidating dividend have the same effect as a sale or exchange of property" and that consequently the distribution in question was a "deductible loss resulting from the sale or exchange of capital assets" within the meaning of section 101(c), (2). See also, Eckols *v.* Commissioner, (C. C. A. 8, 1932) 61 F. (2d) 191; Childs *v.* Commissioner, 35 B. T. A. 1125 (1937); Reg. 77, Art. 625.

The argument that section 23(r) is not here applicable because it is broader and includes more transactions than sections 22(d), 115(c) and 112 and consequently should not control the last named sections, has validity only if the so-called "specific" statutes are in conflict with the so-called "broader" statutes. The statutes are not in conflict unless it is thought that sections 22(d), 115(c) and 112 in and of themselves allow a loss deduction by way of a minus item of gross income. I have above suggested my reasons for thinking that they do not.

While it is true that the general rule is that acts levying taxes are, in case of doubt, to be construed in favor of the citizen, in my opinion the more specific rule applicable here is that deductions, like exemptions, are privileges, and a person claiming a deduction must point to an applicable statute and show that he comes within its terms. New Co-

lonial *v.* Helvering, 292 U. S. 435, and cases cited; see also, Paul & Mertons, Law of Federal Income Taxation, Vol. I, § 330 (1937 Cum. Supp.).

The suggestion that in a stated hypothetical case a harsh result will follow from the conclusion that a distribution in liquidation is an exchange within the intendment of section 23(r) is, I think, answered by the following quotation from Helvering *v.* Twin Bell Syndicate, 293 U. S. 312, 321:

"The respondent insists that, so applied, the sections may work unjust and unequal results, but it is to be remarked that this is likely to be so wherever a rule of thumb is applied without a detailed examination of the facts affecting each taxpayer. No doubt as the petitioner points out, equally illogical results might ensue from the application of the section, as the respondent construes it."

See also, Eckols *v.* Commissioner, *supra.*

I am of the opinion that the decision should be affirmed.

(Endorsed:) Opinion and dissenting opinion. Filed Jun. 2, 1938. Paul P. O'Brien, Clerk.